

DOCUMENT RESUME

ED 145 430

CS 203 642

TITLE The New Copyright Law: Questions Teachers & Librarians Ask.

INSTITUTION American Library Association, Chicago, Ill.; National Council of Teachers of English, Urbana, Ill.; National Education Association, Washington, D.C.

PUB DATE 77

NOTE 74p.

AVAILABLE FROM National Council of Teacher of English, 1111 Kenyon Road, Urbana, Illinois 61801 (Stock No. 33126, \$2.00)

EDRS PRICE MF-\$0.83 Plus Postage. HC Not Available from EDRS.

DESCRIPTORS *Classroom Materials; *Copyrights; *Federal Legislation; *Guidelines; Instructional Materials; Instructional Media; Library Cooperation; *Library Materials; Public Television; *Reprography; Tape Recordings; Video Tape Recordings

IDENTIFIERS *Copyright Act 1978

ABSTRACT

The 1976 general revision of the United States copyright law (Public Law 94-553) sets limits on what copyrighted materials may be copied, under what conditions, and for what purposes. This handbook presents some highlights of the new law that are of particular interest to teachers and librarians and responds to questions that teachers and librarians have raised about it. The book examines the background and meaning of the new law; describes the "fair use" provision that permits teachers, librarians, researchers, scholars, and others to use copyrighted works without paying the copyright holder; provides guidelines for classroom copying of copyrighted materials; tells how the law applies to uses of educational media and technology, including off-the-air taping of television and radio programs; discusses library copying; and explains the provision that protects a teacher or librarian who has innocently infringed copyrighted material. Two appendixes deal with school rerecording of public and instructional television programs and interlibrary arrangements for photocopying. (GW)

* Documents acquired by ERIC include many informal unpublished *

* materials not available from other sources. ERIC makes every effort *

* to obtain the best copy available. Nevertheless, items of marginal *

* reproducibility are often encountered and this affects the quality *

* of the microfiche and hardcopy reproductions ERIC makes available *

* via the ERIC Document Reproduction Service (EDRS). EDRS is not *

* responsible for the quality of the original document. Reproductions *

* supplied by EDRS are the best that can be made from the original. *

ED145430

The New Copyright Law:

U.S. DEPARTMENT OF HEALTH,
EDUCATION & WELFARE
NATIONAL INSTITUTE OF
EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY.

QUESTIONS TEACHERS & LIBRARIANS ASK

A joint project of
American Library Association
National Council of Teachers of English
National Education Association

"PERMISSION TO REPRODUCE THIS
MATERIAL IN MICROFICHE ONLY
HAS BEEN GRANTED BY

National Education
Association

TO THE EDUCATIONAL RESOURCES
INFORMATION CENTER (ERIC) AND
USERS OF THE ERIC SYSTEM."



National Education Association
Washington, D.C.

CS203 642

This handbook may be purchased from each of the
sponsoring organizations:

American Library Association
50 E. Huron Street
Chicago, IL 60611

National Council of Teachers of English
1111 Kenyon Road
Urbana, IL 61801

National Education Association
Order Department
The Academic Building
Saw Mill Road
West Haven, CT 06516

Copyright © 1977
National Education Association
of the United States

Contents

Introduction 7

I. The New Copyright Law 9

A. Some Observations 9

B. Questions About What the Law Means 12

II. Fair Use 17

A. What Is Fair Use? 17

B. Questions About Photocopying for Classroom Use 30

III. Educational Media and Technology, Including Off-the-Air Taping of Television and Radio Programs 43

A. What Does the Law Provide? 43

B. Questions About Educational Media and Technology 47

IV. Library Copying 55

A. What Does the Law Provide? 55

B. Questions About Library Copying 57

V. Penalties and Infringements: Burden of Proof and Remedies for Infringement 63

A. What Does the Law Provide? 63

B. Questions About Penalties and Infringements 65

Epilogue 68

Appendixes

A. Joint Statement of Policy: School Rerecording of Public and Instructional Television Programs 70

B. Photocopying—Interlibrary Arrangements 72

Introduction

For the first time since 1909 the United States has a new copyright law. Public Law 94-553, General Revision of the Copyright Law, was signed by President Gerald R. Ford on October 19, 1976. It amends in its entirety Title 17 of the United States Code. The effective date of the new law is January 1, 1978.

The new law has enormous implications for teachers, librarians, researchers, and scholars. It substantially affects classroom practices in the uses of materials in teaching and learning. This handbook presents some highlights of the new law that are of particular interest to teachers and librarians and insofar as possible responds to questions which teachers and librarians have raised about it. Admittedly, this is not an easy task because in many instances the uncertainty of the language of the new law makes it difficult to give a clear, simple explanation of what may or may not be copied. Ultimately, a definitive answer to some questions may require a judicial decision.

The educational community does not consider that the new copyright law gives them the privilege of making unlimited copies of copyrighted works. In fact, the law limits what may be copied, under what conditions, and for what purposes. The educational community does not wish to deny the rights of authors, many of whom are teachers and librarians. What it does wish and has

endeavored to do is to enable teachers and students to have access to information at the time they need it most—that “teachable moment” when students are ready to learn—and to protect the free flow of information so vital in a democratic society.

Copyright is a limited monopoly granted by federal law. The basic issue is to determine the terms of and the limitations upon such monopoly in order to protect the public interest.

I

THE NEW COPYRIGHT LAW

A. SOME OBSERVATIONS

Article I, Section 8, of the Constitution of the United States gives to Congress the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Thus empowered, Congress enacted the first federal copyright law in 1790. Even in its beginnings there were limitations on the scope of the monopoly. The provisions of the 1790 Copyright Act were enlarged and revised by subsequent acts at intervals of about 40 years—in 1831, 1879, and 1909. Finally, in 1976 a new copyright law was passed, the first major revision of the laws governing intellectual property in this country in almost 70 years.

The House Committee report accompanying P.L. 94-553 gives this background as to why the new copyright law was needed to replace the 1909 version:

Since that time significant changes in technology have affected the operation of the copyright law. Motion pictures and sound recordings had just made their appearance in 1909, and radio and television were still in the early stages of their development. During the past half century a wide range of new techniques for capturing and communicating printed matter, visual images, and recorded sounds have come into use, and the increasing use of information, storage and retrieval devices, communications satellites, and laser technology promises even greater changes in the near future. The technical advances have generated new industries and new methods for the reproduction and dissemination of copyrighted works, and the business relations between authors and users have evolved new patterns.

The copyright law is intended to bring about a balance between the interests of the proprietors of copyright and the interests of the users of copyrighted materials. Initially, Congress believed that it could protect the public interest by providing some incentive for authorship. The thought was that if authors could be assured of some financial return for their efforts, they would be more likely to create works. These works would, in turn, increase the store of information and ideas

available to the public. There is now more recognition of the need for balance among all affected interests.

It is important to keep in mind that *each* of these groups—the proprietors and the users of copyrighted material—have certain “rights.” The rights of the copyright proprietors are granted by acts of Congress, not by the Constitution itself, and accordingly are sometimes referred to as statutory privileges. Users of copyrighted materials also have rights, and these do originate in the Constitution. In particular, the First and Ninth Amendments guarantee to the American people the right to know and the right to read.

In United States law, copyright is a limited statutory monopoly which involves the privilege to restrict as well as to monopolize the diffusion of knowledge; hence, the public’s *right* to use materials must be protected. The late Chief Justice Charles Evans Hughes, in interpreting the copyright law, rendered this opinion: “The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefit derived by the public from the labors of authors.”

Certain safeguards have been written into the new law to protect teachers, librarians, researchers, and scholars as they carry out their responsibilities for educating all the people or for conducting research. These safeguards not only better enable them to carry out the responsibilities for which they are employed but guarantee their rights, as citizens of the United States, of access to information for teaching and learning purposes.

B. QUESTIONS ABOUT WHAT THE LAW MEANS

1. What are the basic documents upon which the new copyright law is built?

The bill for general revision of the United States copyright law was signed into law by President Ford on October 19, 1976, and became P.L. 94-553 (Title 17, U.S. Code). The supporting documents which help to interpret the law are the following from the Ninety-fourth Congress: Conference Committee report (to accompany the bill S.22) on general revision of the copyright law (House Report 94-1733); report of the House Judiciary Committee (House Report 94-1476); report of the Senate Judiciary Committee (Senate Report 94-473); corrections to the House Judiciary Committee report in the *Congressional Record*, September 21, 1976, pages H10727-28; and the House debate in the *Congressional Record*, September 22, 1976, beginning on page H10872.

2. Are these congressional reports important in understanding the law?

Yes. While they do not have the same force as law, they can be very influential in court cases. They have less impact where the statute is clear on its face. If the statute is not clear on its face, the reports are a major source for interpretation of the statute.

3. Is the new law retroactive?

No. There is nothing retroactive about the new law.

4. Does the new law preserve the differences between common and statutory law which have been part of previous copyright enactments?

No. The new law abolishes common law (nonstatutory law normally enforced by the courts) and extends copyright protection to unpublished works. It puts everything under statutory copyright. From now on, everything will be copyrighted upon creation of the work. Instead of the dual system of protecting works under common law before they are published and under the federal statute after publication, the new law establishes a single system of statutory protection for all copyrightable works, whether published or unpublished.

5. How does the new law affect the duration of copyright?

For works created after January 1, 1978, the new law provides a term lasting for the life of the author, plus 50 years after the author's death, and a term of 75 years after publication for anonymous works. The law

abolishes the 28-year term from first publication and the 28-year renewal period. For works already under statutory protection, the new law basically increases the present total 56-year term to 75 years by a series of complex provisions.

6. If everything is to be copyrighted upon creation, will it be necessary in the future to affix the date of copyright on the reverse side of the title page?

The old law requires, as a mandatory condition of copyright protection, that the published copies of a work bear a copyright notice. The new one calls for a notice on published copies, but omission or error will not immediately result in forfeiture of the copyright and can be corrected within certain time limits. Innocent infringers misled by the omission or error will be shielded from liability under the new law.

7. Will registration of the work be required in the future?

Registration (or "getting the work 'copyrighted' ") will not be a condition of copyright protection, but the law provides inducement to register. A copyright owner whose work is infringed before registration will be entitled to certain remedies but cannot enforce his right in the courts until the work is registered. With certain

exceptions, statutory damages and attorneys' fees are not recoverable for infringement of unregistered works.

8. How may I learn if a particular publication is in the public domain?

By contacting the Register of Copyrights at the Library of Congress, Washington, D.C. 20559. Under the new law the Register of Copyrights will keep records of the deaths of authors and should be able to inform users, upon request, if a given work is in the public domain.

9. Does the new law invalidate contractual arrangements which libraries make with film or television producers when they obtain copies or phonorecords of works for their library collections?

No. Such contractual obligations are made over and above the copyright law; hence, they must be honored first by the contracting parties. In effect, the librarian agrees to set aside the copyright law for a new set of obligations when he/she signs a contract with the producer/publisher for the purchase and use of a given film, television program, or other work for a specified period of time in accordance with agreed-upon conditions of use. For this reason, librarians should study carefully all purchase contracts before signing (Sec. 108[f] [4]).

10. Does the user retain his or her rights under federal copyright law despite contracts negotiated between producers and talent?

Probably yes, although this has not been decided by the courts. In this instance, the user is not involved in the contract except as a third party. The producer cannot take away the user's statutory right to fair use of a given book, article, film, or television program by a contract between a performer or actor in the film or TV program and him- or herself.

11. How does a teacher or librarian register copyright on his/her own work?

The teacher or librarian would follow this procedure:

- a. Obtain an application form for copyright from the Copyright Office, Library of Congress, Washington, D.C. 20559. Specify the type of work in order to receive the proper form (poem, novel, film, etc.).
- b. Put on the verso of the title page the word *copyright*, followed by your name and the year.
- c. Send two copies of your work with the appropriate fee (\$10) and application form to the U. S. Register of Copyrights at the above address.

II

FAIR USE

A. WHAT IS FAIR USE?

Fair use has been defined as the right to use copyrighted materials in a reasonable manner without consent of the author. It has been called one of the most important limitations on the copyright owner's exclusive rights and has been described as the court-developed doctrine that permits teachers, librarians, researchers, scholars, and others to use copyrighted works without paying the copyright holder. For the first time, fair use is now written into the law. Section 107 of P.L. 94-553 reads as follows:

107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of Section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching

(including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

In House Report 94-1476, Congress has written:

The criteria of fair use are necessarily set forth in general terms. In the application of the criteria of fair use to specific photocopying practices of libraries, it is the intent of this legislation to provide an appropriate balancing of the rights of creators, and the needs of users. (p. 74)

The four statutory criteria are relevant in determining whether fair use applies to a particular instance of copying. They cover the making of single copies and the making of multiple copies, but whether or not the copying to be done falls within fair use must be decided on the basis of its own particular circumstances.

Certain items are especially noteworthy. This law represents the first explicit recognition that:

1. Fair use includes "teaching (including multiple copies for classroom use)"; and
2. A valid consideration as to "the purpose and character of the use" claimed to be a fair use is "whether such use is of a commercial nature or is for nonprofit educational purposes."

In this connection it is also relevant to note (as described in Chapter V) that the new law transfers to the copyright owner the burden of proof in connection with innocent infringements by teachers, librarians, archivists, and public broadcasters.

To aid in the interpretation of fair use, and especially to clarify the fair use right for teachers at all levels, a set of minimum guidelines was drawn up by representatives of educators, authors, and publishers. (Parties to the agreement were representatives of the Ad Hoc Committee of Educational Organizations and Institutions on Copyright Law Revision, the Authors League of America, and the Association of American Publishers.) The guidelines make no attempt to cover all kinds of permissible fair use copying. They apply only to copying for teachers and students in nonprofit educational institutions and to copying from books and periodicals. In addition, they clarify only minimum standards of such copying. Copying which does not fall within the minimum guidelines may nonetheless be permitted under the statutory fair use criteria. The complete text of the agreement reached by the educators, authors, and publishers is included in the House Judiciary Committee

report (House Report 94-1476, pp. 68-70) which accompanies the new law. It reads as follows:

AGREEMENT ON GUIDELINES
FOR CLASSROOM COPYING
IN NOT-FOR-PROFIT
EDUCATIONAL INSTITUTIONS

With Respect to Books and Periodicals

The purpose of the following guidelines is to state the minimum and not the maximum standards of educational fair use under Section 107 of H.R. 2223. The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in the future; that certain types of copying permitted under these guidelines may not be permissible in the future; and conversely that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines.

Moreover, the following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in Section 107 of the Copyright Revision Bill. There may be instances in which copying which does not fall within the guidelines stated below

may nonetheless be permitted under the criteria of fair use.

GUIDELINES

I. Single Copying for Teachers

A single copy may be made of any of the following by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class:

- A. A chapter from a book;
- B. An article from a periodical or newspaper;
- C. A short story, short essay or short poem, whether or not from a collective work;
- D. A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper.

II. Multiple Copies for Classroom Use

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion, provided that:

- A. The copying meets the tests of brevity and spontaneity as defined below; and,
- B. Meets the cumulative effect test as defined below; and,
- C. Each copy includes a notice of copyright.

Definitions

Brevity

- (i) Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages, or (b) from a longer poem, an excerpt of not more than 250 words.
- (ii) Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10 percent of the work, whichever is less, but in any event a minimum of 500 words.

[Each of the numerical limits stated in *i* and *ii* above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.]

- (iii) Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.
- (iv) "Special" works: Certain works in poetry, prose or in "poetic prose" which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. Paragraph *ii* above notwithstanding, such "special works" may not be

reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10 percent of the words found in the text thereof, may be reproduced.

Spontaneity

- (i) The copying is at the instance and inspiration of the individual teacher, and
- (ii) The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

Cumulative Effect

- (i) The copying of the material is for only one course in the school in which the copies are made.
- (ii) Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.
- (iii) There shall not be more than nine instances of such multiple copying for one course during one class term.

[The limitations stated in *ii* and *iii* above shall not apply to current news periodicals and

newspapers and current news sections of other periodicals.]

III. Prohibitions as to I and II Above

Notwithstanding any of the above, the following shall be prohibited:

- A. Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various works or excerpts therefrom are accumulated or reproduced and used separately.
- B. There shall be no copying of or from works intended to be "consumable" in the course of study or of teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material.
- C. Copying shall not:
 - (a) substitute for the purchase of books, publishers' reprints or periodicals;
 - (b) be directed by higher authority;
 - (c) be repeated with respect to the same item by the same teacher from term to term.
- D. No charge shall be made to the student beyond the actual cost of the photocopying.

*

The foregoing agreement was reached after several years of discussion among the groups involved. Concessions were granted by all sides, although at times reluctantly, to reach a minimal position which seemed reasonable and fair—and clear. No side of the controversy “won” or “lost.” Each achieved some goals; each was disappointed in some aspects. Overall, the new law represents a compromise between the various interests involved, designed to bring at least a minimum of certainty to fair use.

Congressional approval of the minimum guidelines makes it clear that under the new law teachers have a fair use right to make (1) single photocopies (for their own use in teaching or in preparing to teach) of a chapter from a book, an article from a periodical, a short story or poem, a chart or picture from a book, periodical, or newspaper; and (2) multiple photocopies for classroom use by students, subject to criteria such as (a) the number of words to be copied, (b) the spontaneity of the need for such copies (at the teachable moment when pupils are ready to learn), and (c) the cumulative effect of such copying.

Three categories of use are implied by the guidelines: minimum fair use, above minimum fair use, and uses which exceed fair use and are permitted only with permission from and/or payment to the copyright holder. When copying fits within the minimum guidelines, there is no question as to the applicability of the fair use right. These guidelines constitute a floor below which teachers and librarians cannot be pushed. Copying that

does not fit within the guidelines may be fair or not fair depending on the circumstances. For example, the statute states that multiple copying of excerpts may be reasonable and that the teacher *may* be protected if he/she exceeds the quantitative figure set forth in the guidelines. If a teacher needs to copy an entire article, story, or essay that is 265 words in length (instead of the prescribed minimum of 250 words), the additional 15 words might be considered a reasonable extension of the guidelines. Where the copying a teacher wishes to do clearly is not allowed by either the law or the guidelines, such use would be permitted only by obtaining permission, and if required, by making payment to the copyright holder. It is important that librarians and teachers recognize the flexibility of fair use and not permit the approved "minimum" to become the "maximum."

A similar agreement establishing guidelines for five types of permissible minimum educational uses of music was worked out concurrently by representatives of six national music organizations clarifying fair use as it applies to music. This agreement also is included in House Report 94-1476, as follows:

GUIDELINES FOR EDUCATIONAL USES OF MUSIC

The purpose of the following guidelines is to state the minimum and not the maximum standards of educational fair use under Section 107 of H.R. 2223. The parties agree that the

conditions determining the extent of permissible copying for educational purposes may change in the future; that certain types of copying permitted under these guidelines may not be permissible in the future, and conversely that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines.

Moreover, the following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in Section 107 of the Copyright Revision Bill. There may be instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.

A. Permissible Uses

1. Emergency copying to replace purchased copies which for any reason are not available for an imminent performance provided purchased replacement copies shall be substituted in due course.

2. For academic purposes other than performance, single or multiple copies of excerpts of works may be made, provided that the excerpts do not comprise a part of the whole which would constitute a performable unit such as a selection, movement or aria, but in no case

more than 10 percent of the whole work. The number of copies shall not exceed one copy per pupil.

3. Printed copies which have been purchased may be edited or simplified provided that the fundamental character of the work is not distorted or the lyrics, if any, altered or lyrics added if none exist.

4. A single copy of recordings of performances by students may be made for evaluation or rehearsal purposes and may be retained by the educational institution or individual teacher.

5. A single copy of a sound recording (such as a tape, disc or cassette) of copyrighted music may be made from sound recordings owned by an educational institution or an individual teacher for the purpose of constructing aural exercises or examinations and may be retained by the educational institution or individual teacher. (This pertains only to the copyright of the music itself and not to any copyright which may exist in the sound recording.)

B. Prohibitions

1. Copying to create or replace or substitute for anthologies, compilations or collective works.

2. Copying of or from works intended to be "consumable" in the course of study or of teaching such as workbooks, exercises, stan-

dardized tests and answer sheets and like material.

3. Copying for the purpose of performance, except as in A(1) above.

4. Copying for the purpose of substituting for the purchase of music, except as in A(1) and A(2) above.

5. Copying without inclusion of the copyright notice which appears on the printed copy.

The two sets of guidelines were adopted not only by the House Committee but also by the Senate Judiciary Committee in the conference report "as part of their understanding of fair use. . ." The individuals who labored to reach the above agreements, as well as the congressional committees, feel the guidelines for print materials and for music are reasonable and fair—and clear. On the other hand, individual teachers and librarians are already asking questions and the press has already begun to interpret. Hence, some of the questions most frequently asked by teachers and librarians are listed in each section of this report. The questions have been selected at random to include as broad a scope as possible and to clarify the intent of the parties who designed the guidelines and of the committees that adopted them in their reports. However, the answers should not be construed as official interpretations of the federal law. Only the courts have this responsibility.

B. QUESTIONS ABOUT PHOTOCOPYING FOR CLASSROOM USE

1. What is meant by "fair use"?

Strange as it may seem, there is no real definition of fair use in the law. There are some applicable criteria and a general concept of what it means. The concept of fair use is the legal right to copy without permission or payment a limited amount of copyrighted material where the use is reasonable and not unduly harmful to the copyright owner. Current writers in the copyright field have described the concept of fair use in varied ways. For example:

- The privilege of using copyrighted material in a reasonable manner without the consent of the author
- The doctrine establishing the principle that a copyright is not infringed, and damages may not be assessed or further copying enjoined, if the material is to be "used" in ways that are "fair" to all concerned
- An equitable rule of reason
- A safety valve.

2. What criteria does Congress set up for determining whether a given use is a fair use?

As noted previously, Congress has established four criteria for determining if a given use is a fair use:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

And in the House report, Congress has written:

The criteria of fair use are necessarily set forth in general terms. In the application of the criteria of fair use to specific photocopying practices of libraries, it is the intent of this legislation to provide an appropriate balance of the rights of creators, and the needs of users.

3. What kinds of materials may be copied under fair use?

Excerpts from books, periodicals, newspapers, musical, graphic, and audiovisual works, including short whole works, are among the kinds of material that may be subject to fair use copying under certain circumstances. Off-the-air taping also may be fair use.

4. Who may take advantage of the fair use provision?

Educators, librarians, scholars, researchers, students, and users of libraries are among those eligible to

exercise the right of fair use. It is the *use* made of the material that is significant more than the occupation of the user. (See fair use criteria in question 2 above.)

5. How does fair use in the new law differ from fair use in the 1909 law?

The 1909 law makes no provision for any copying. Whether an instance of copying was considered fair use depended solely upon judicial interpretation by the courts on a case-by-case basis. In the new law, fair use is given statutory recognition for the first time. It appears in Section 107. Furthermore, the congressional reports add to the possibility of certainty by outlining what Congress intended by "fair use."

6. Are there guidelines to help teachers determine whether copying may be fair use?

Yes, there are two sets of fair use guidelines included in the legislative history of the new copyright law: guidelines on copying from books and periodicals for teachers and students in nonprofit educational institutions, and guidelines on educational uses of music. Both are reprinted in this chapter of the handbook (pp. 20-29).

7. Are the guidelines applicable only to teachers? What about librarians?

The word *teacher* in the guidelines is meant to include not only educators but librarians and other instructional specialists working in consultation with teachers.

8. What is the relationship between the guidelines and the law?

The guidelines are not written into the law itself but are part of the legislative history of the copyright act that courts will use in interpreting the law's provisions. The House Judiciary Committee, in its report on the copyright act (House Report 94-1476, p. 72), comments as follows on the guidelines:

The Committee believes the guidelines are a reasonable interpretation of the minimum standards of fair use. Teachers will know that copying within the guidelines is fair use. Thus, the guidelines serve the purpose of filling the need for greater certainty and protection for teachers.

9. Are the guidelines easy to use? Are they any help for teachers and librarians?

Yes, they provide a practical, straightforward way to determine the extent to which a given work, or portion of a work, may be reproduced for teaching, scholarship, or research purposes. In applying the guidelines, three standards must be considered: *brevity, spontaneity, and cumulative effect*.

As to *brevity*, the guidelines provide a quantitative measure of what might reasonably be considered minimum fair use. Different measures apply, depending on whether the work is a poem, prose, or an illustration.

Spontaneity, the guidelines stress, is the central consideration in any fair use situation. By spontaneity is

meant (a) that the copying is done at the instance and inspiration of the individual teacher, and (b) that the inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for information.

The third consideration, *cumulative effect*, means that there is no intention to anthologize the reproduced materials, that the copying is for only one course in the school in which the copies are made, that not more than one or two excerpts from the same author nor more than three from the same work during one term are involved, and that not more than nine instances of such multiple copying for one course during one term are anticipated.

10. In the section on cumulative effect in the guidelines, what is the meaning of the term "course"? The guidelines state, "There shall not be more than nine instances of such multiple copying for one course for one class term." For a fifth-grade teacher, does this mean that "fifth grade" is a course, or does it mean the separate subjects such as English or social studies that the teacher must teach?

Although it is not written into the guidelines, there was an understanding among the negotiators that by

"course" is meant one semester or term of a given subject. In the case of the fifth-grade teacher, the intent is that "course" would refer to the subject taught. The teacher who teaches several subjects to the same students would be entitled to the nine instances of copying in each of the subjects he/she teaches.

11. In the section on prohibitions in the guidelines, what is the meaning of the phrase, "Copying shall not be directed by higher authority"?

In the elementary and secondary schools, the curriculum guide for a particular grade level or course may mandate or recommend that a teacher use certain duplicated materials to assist his/her teaching at a particular time during the course. Or the department head in a school which depends heavily on ability grouping may believe that some of the less desirable consequences of such tracking could be overcome if all the students in English classes in grades 10-12 share periodically the same literary experience on the same day. With the help of a couple of department members, he/she chooses a substantial excerpt from *Marquis'archy and mehitabel* because it is amusing and easy to read. The department head then asks the school secretary to make enough copies for all the students. These practices would not be permitted under the guidelines if permission had not been obtained in advance by the super-

visor. The use would have been "directed by higher authority." The assumption here is that the writer of the curriculum guide or the department head would have had time to clear the material and obtain permission in advance since curriculum guides are usually written at least a term ahead.

12. The guidelines seem to imply that if one teacher in a school makes multiple copies of, for example, Karl Shapiro's "Auto Wreck" for his/her own specific course, no other teacher of that same course may do it. Is this interpretation correct?

No, it is not correct. In reply, one might ask, "If the school is a relatively large school, or even if it is a major university, with several hundred teachers, how would any one teacher know what works had been copied by other teachers?" It is the specific intent of the guidelines to eliminate such uncertainty for teachers. It is the intent to permit a teacher, acting under his/her own volition, to copy—subject to length and spontaneity—sufficient copies for students in his/her course, even if he/she teaches two sections of that course. The teacher may not, however, make an overrun of copies for other teachers even if they are teaching the same course. Likewise, if

copies are made for a specific teacher in a specific course, that teacher may not use them in another course except under the restrictions of the guidelines (i.e., the number of times copying is permitted for a single course, spontaneity, and brevity).

13. Does use of a work for one term mean that a teacher would be permitted to use Frost's "Birches" in the fall semester of American Literature but not in the spring semester of the same course?

Precisely so. Assuming spontaneity in the fall semester, the copying of "Birches" would fit, but if it worked, then the teacher would have time to ask permission of the copyright holder to use it again several months later.

14. May a teacher duplicate six pages from an out-of-print textbook to send to an absent student?

Most likely yes, under the single-copy provision. If it would have been appropriate to make a copy for that student in the class, the out-of-class student copy is also appropriate.

15. May a teacher duplicate a page of synonyms and antonyms from a workbook used at a different grade level for a student who needs special help?

Workbooks, exercises, standardized tests, and test booklets and answer sheets are considered consumable materials in the guidelines and may *not* be reproduced. In this instance—where only one page and one student are involved—one could argue that this particular use would probably be categorized as a fair use, provided it is an isolated instance and not a regular practice.

16. Our school recently purchased new literature texts. A short story which I have had much success with is not contained in them. Since the story is only four pages long, about 2,000 words, I made 30 copies for my class. Would this be permitted under the new law?

Yes, it would be permitted provided the test of spontaneity was met, i.e., depending on the time elapsed between when you discovered that the story was not included and when it was used. However, it would definitely not be permitted if you were to use it a second time without permission from the copyright holder.

17. "The Wizard of Id" is a syndicated comic strip. Its humor rests often on linguistic and semantic slips. If I photocopied the strip to post on my bulletin board and if a number of other teachers saw it and liked it and wanted copies for their bulletin boards, could I make them?

There would be no problem for you in copying and posting the single strip. Also, since only one copy would be requested by other individual teachers for their classroom use, you could make several copies, one for each teacher who requested it spontaneously. However, you could not distribute copies which were not requested.

18. A teacher would like to duplicate 30 copies of all the poems about snow she could find for an English class to read and discuss. Each student, in accordance with instructions, would select one poem which most made him/her feel the cold. Would this be permissible under the new law?

Probably not. The teacher has a problem here. Under the guidelines, he/she is restricted to nine copyrighted poems and then must forego all multiple copying privileges for the rest of the term (Para. II, Cumulative Effect [iii]). (Comment: A good idea, but an

expensive one under the guidelines!) Furthermore, the guidelines prohibit copying used to create or replace or substitute for anthologies, compilations, or collective works.

19. On certain festive occasions or before a holiday, could a teacher make multiple copies of a poem, short story, or essay so that the class might better understand and/or appreciate the occasion?

This would be permissible if the restrictions on brevity, spontaneity, and cumulative effect are adhered to. It would not be permissible a second time without obtaining permission from the copyright holder.

20. Art Buchwald's column is not carried by our local newspaper. I subscribe to an out-of-town paper and often use copies of his column in my social studies class to spark discussion. Is this permitted?

The intent and spirit of the writers concerning the freedom given in the section in brackets following Paragraph II, Cumulative Effect (iii) of the guidelines should apply only to news. Therefore, the intent of the guidelines would not permit the above practice as stated. The use of a syndicated column in a newspaper would have the same restrictions as any other prose selection. The practice would

seem to be permitted, however, if a literal interpretation is given to the bracketed passage.

21. A choral director in the local high school makes a new arrangement of a popular song and reproduces 48 copies of the arrangement on a duplicating machine for members of his chorus. Permitted?

No. The music guidelines would not permit this because the fundamental character of the work has been altered. This would exceed the bounds of fair use.

22. Can a copyright holder prevent fair use by a teacher, librarian, or researcher with a statement next to the copyright notice as follows: "All rights reserved. No part of this book may be reproduced or utilized in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system, without permission in writing from the publisher"?

No. Such notice cannot abridge the user's fair use rights under the statute.

23. May a school, college, or library feed a copyrighted work into a computer, without infringement, on the assumption that questions of fair use or payment would be limited to output or printout?

There is no clear answer. The law, Section 117, merely says that it makes no change in what the previous law was. The House Committee, in Report 94-1476, says that "it would be premature" to legislate now and will await the report of the statutorily created National Commission on New Technological Uses of Copyrighted Works.

24. May a teacher reproduce a workbook, in whole or in part, for all students in the class?

Positively not! Workbooks are consumable upon use and this would be a definite infringement.

III

EDUCATIONAL MEDIA AND TECHNOLOGY, INCLUDING OFF-THE-AIR TAPING OF TELEVISION AND RADIO PROGRAMS

A. WHAT DOES THE LAW PROVIDE?

For the first time, Congress has specifically recognized in the legislative history of the new copyright law that off-the-air taping of commercial television and radio programs for nonprofit educational use by teachers in classrooms may be fair use. The problem comes in determining the scope of fair use in this context. The House Judiciary Committee (in House Report 94-1476) comments as follows:

The problem of off-the-air taping for non-profit classroom use of copyrighted audiovisual works incorporated in radio and television broadcasts has proved to be difficult to resolve. The Committee

believes that the fair use doctrine has some limited application in this area, but it appears that the development of detailed guidelines will require a more thorough exploration than has so far been possible of the needs and problems of a number of different interests affected, and of the various legal problems presented. Nothing in section 107 or elsewhere in the bill is intended to change or prejudice the law on the point. On the other hand, the Committee is sensitive to the importance of the problem, and urges the representatives of the various interests, if possible under the leadership of the Register of Copyrights, to continue their discussions actively and in a constructive spirit. If it would be helpful to a solution, the Committee is receptive to undertaking further consideration of the problem in a future Congress. (p. 71)

As a first step in responding to this legislative mandate, the Copyright Office and the Ford Foundation sponsored a conference on video recording for educational uses in July 1977. Although there appeared to be overwhelming consensus on the part of conferees (some 70 participants broadly representative of a wide range of viewpoints and interests, including the Register of Copyrights) that fair use does indeed have application to off-the-air taping, there were widely divergent views as to what constitutes fair use and what kinds of procedures might be set up for "over and above fair use" situations. Several

methods were discussed for making materials automatically available without permission and with compensation for those instances where the teacher or librarian wants to keep the copy beyond a particular fair use period. No specifics were agreed to at this conference. Further follow-up on the meeting is planned by the Copyright Office.

Thus, at the time this handbook goes to press, all that can safely be said on this subject is:

1. "The fair use doctrine has some limited application" to off-the-air taping of commercial radio and television broadcasts for nonprofit classroom use; and
2. Guidelines need to be developed to provide for greater certainty, and the process for doing this has already been started.

In the case of off-the-air copying of noncommercial (public) television and radio programs, the public broadcasting industry has made many favorable concessions to make instructional television programs available to classrooms through off-the-air taping. For example, four national public broadcasting agencies (Public Broadcasting Service, Great Plains National Instructional Television Library, Public Television Library, and the Agency for Instructional Television)² have developed a joint policy statement pertaining to "School Rerecording of Public and Instructional Television Programs." The policy statement covers all such programming distributed by the agencies, excluding only those programs prohibited by reason of production or distribution rights restrictions.

It permits a school, within certain specified limitations, to record off the air public and instructional programs distributed by the agencies and to retain these rerecordings *for a seven-day period*. The signatories to this policy intend to publish lists of programs schools may copy. Teachers and librarians should contact their local public broadcasting station for the program lists and for further information if desired.

The joint statement of policy is reprinted in Appendix A of this handbook.

The commercial television networks have refused to allow educational institutions to tape programs off the air without permission because of contracts they have with performer guilds and producing organizations. In the past year several networks have offered a licensing plan to schools for the privilege of taping off the air "hard news" and certain news events." Under the new law, in Section 108, libraries and archives have been given the right to record newscasts off the air. This same section permits libraries to reproduce and distribute "a limited number of copies and excerpts of an audiovisual news program," subject to certain conditions applicable to all types of copying authorized for library purposes. Other than these, there have been no major concessions to education by the commercial broadcasting industry with respect to off-the-air taping.

In the long history of the copyright revision effort that culminated in the 1976 copyright law, for some reason not much attention was given to off-the-air taping of commercial broadcasts and telecasts for noncom-

mercial educational uses. This was due in part to the reluctance of some sectors of the TV industry and in part to the fact that only very recently has the technology been available in a form that makes such off-the-air taping a substantial problem. In any event, Congress has told the parties, in effect, to "get together and agree on something" before Congress itself acts to ratify such consensus. Since guidelines have not been developed, teachers and librarians must make every effort to keep their practices within the spirit of the fair use criteria.

B. QUESTIONS ABOUT EDUCATIONAL MEDIA AND TECHNOLOGY

1. May a teacher make a transparency of a map or chart in a newspaper for showing to the class?

Yes, a single transparency may be made under the single-copy provision of the guidelines pertaining to books and periodicals (see Chapter II) subject to the provisions outlined in Paragraph III (A), (B), and (C).

2. May a teacher use an opaque projector to enlarge an outline map from a reference book to measure students' ability to name states, rivers, and capitals?

Yes. In the case of an opaque projector, no copyright issue is involved since no copying is involved.

3. Is it permissible under the new law for a teacher to videotape a television or radio program off the air for later playback to his/her class?

The House Committee states that the fair use doctrine has "limited" application in this area, but agreed-upon guidelines between the parties concerned as to what constitutes fair use have yet to be developed. In the case of public broadcasting, schools are permitted in most (but not all) instances to tape programs off the air and retain such recordings for a seven-day period. Four public broadcasting agencies have developed a joint policy covering such off-the-air taping (see Appendix A). This policy, however, has not been extended to public libraries but is limited to the context of classroom instruction. In the case of commercial television programming, there is still no consensus as to how much of a program may be copied and how long that copy may be retained before it is erased. The fact that there is no agreement on what is a "minimum" guaranteed fair use in off-the-air taping, however, does *not* mean that there is no fair use in such circumstances. It does mean that action by schools is more at their peril than if agreed-upon minimum guidelines were adopted by the congressional committees. It could well be that some judicial decisions may go a long way toward deciding this question even before guidelines are devised or accepted.

4. Does the above also apply to taping the audio portion of a TV panel show off the air for later playback to a class?

Yes, the same situation applies. Most parties agree that some type of permission procedure for copying over and above fair use will eventually be devised so that teachers will have easy, efficient access to TV and radio programs. In the meantime, teachers must make every effort to live within the established fair use criteria.

5. May a school library/media center make a video cassette of a 16mm film which it owns?

No, this would be an infringement of copyright. The fact that the library had already purchased the film does not necessarily mean the library bought the rights to reproduce it.

6. Is it legal for a school district to show on closed-circuit television 16mm films from its library to schools within the district?

This would present a problem unless the closed-circuit system is *confined to one building*. The latter situation, would be comparable to showing the film on a 16mm projector within the school and would be allowable. Otherwise, the practice would be prohibited.

7. May a librarian make an audio cassette of a disc recording for more efficient storage and retrieval purposes or for individual teachers?

Section 108 does not permit a library to copy an entire work for such purpose. However, this section will permit the taping of a deteriorating disc recording, under certain circumstances, should an unused replacement be unavailable at a fair price.

8. Students often make reports on tape. To make the tapes more attractive they include background music from records. Is this permissible?

A short musical excerpt would be permissible, but continuous music throughout would not.

9. Is it permissible for a media center to show on television the preview of a film it is considering for purchase in order to obtain the widest possible evaluation from teachers?

There are two problems here, one regarding contract and one regarding copyright. It is possible,

although by no means assured, that on the copyright question alone such a practice might conceivably be permitted in some instances under Section 110 (2) (c) (iii), which authorizes transmission of a nondramatic literary or musical work if such transmission is made primarily for "reception by officers or employees of governmental bodies as a part of their official duties or employment." The House Report describes such transmission as in-service training. However, it must also be determined whether such transmission is permitted under the contract between the media center and the distributor or producer.

10. A school music teacher tapes a performance of his/her school orchestra for purposes of student evaluation or analysis. Is this permissible under the new law?

Yes, this is clearly allowed under the music guidelines (see Chapter II). If, however, one copy were to be made for each student in the class to take home, this would be an infringement. The guidelines state, "A single copy of recordings of performances by students may be made for evaluation or rehearsal purposes and may be retained by the educational institution or individual teacher."

11. A media center in a large high school tapes musical selections from various radio broadcasts to illustrate for students various forms of popular music and makes copies of the tape available to all the music teachers in the school. Is this permitted under the new law?

No, this would be prohibited because the effect would be to create an anthology or compilation.

12. May a teacher show a film (bought by the school) in a nonschool building used for an adult education class?

Yes. The law allows performance or display of a work by a teacher "in a classroom or similar place devoted to instruction." (This assumes that the purchase contract does not forbid such use.)

13. Does the same apply to showing the film itself (not by TV) to a homebound pupil in his/her home?

Yes.

14. Does this same apply if 10 classes are brought together in an auditorium?

Yes, if no one from outside the school is present.

15. Does this apply also to performances in the school where the public is invited and is present?

Yes, but only if it is a nondramatic literary or musical work, and only if the performance is "without any purpose of direct or indirect commercial advantage" as defined in the statute.

16. May an instructional broadcast use copyrighted materials without clearance or permission?

Only in certain instances:

1. The material must be a nondramatic literary or musical work.
2. The performance must be "a regular part of the systematic instructional activities of . . . a nonprofit educational institution."
3. The performance must be "directly related and of material assistance to the teaching content of the transmission."
4. The transmission must be made primarily for "reception in classrooms or similar places normally devoted to instruction," or "reception by persons to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction," or "reception

by officers or employees of governmental bodies as a part of their official duties or employment."

17. Do these provisions authorize instructional broadcasts to use copyrighted material without clearance or permission for instructional TV college credit courses?

Yes, under the same conditions and limitations if the broadcasts are aimed at regularly enrolled students and are conducted by recognized higher educational institutions.

18. May a librarian make an audio cassette of Mussorgsky's "Pictures at an Exhibition" for use by a student instead of allowing the student to check out the library's disc recording of his work, which may break if allowed to circulate?

Making a copy of the entire work without permission would be unlawful, unless the library acquired reproduction rights at the time of purchase. Excerpting small portions of the work on tape for student use would constitute fair use.

IV

LIBRARY COPYING

A. WHAT DOES THE LAW PROVIDE?

The new copyright law treats copying by libraries somewhat differently from copying by teachers, students, researchers, or scholars. The doctrine of fair use, set forth in Section 107, applies to libraries just as it does to educators and others, and to this extent libraries are treated no differently. It is in connection with this section that guidelines for classroom and teaching uses of books and periodicals were developed as well as guidelines for educational uses of music. These guidelines apply to librarians in educational institutions in their work with members of the instructional staff.

Library copying that may exceed fair use is authorized in Section 108 of the new law. In connection with this section, a set of guidelines on interlibrary lending was developed by representatives of author, publisher, and library organizations under the aegis of the National Commission on New Technological Uses of Copyrighted

Works. These guidelines (officially called "Guidelines for the Proviso of Subsection 108 [g] [2].") were included in the conference report on the copyright act (House Report 94-1733, p. 72) and are reprinted in Appendix B of this handbook.

To determine whether or not a particular library is eligible to make copies as authorized by Section 108 of the law, the librarian should look first at Section 108 (a) to see whether the library meets the three eligibility criteria:

1. The library must be one whose collections are open to the public or available to outside researchers.
2. The copying must not be done for commercial advantage.
3. Copies must include a notice of copyright.

If the library meets the requirements of Section 108 (a), it is then eligible to make copies as authorized by the rest of Section 108. These are of two general kinds: copies for the library collection, and copies for library users. Copies for the collection are authorized in Section 108 (b) and (c), provided certain conditions are met, while copies for users are authorized in Section 108 (d) and (e) as limited by Section 108 (g) and (h). Librarians are urged to study the text of Section 108 of the law, in addition to Section 107 on fair use, since both apply to library copying.

Section 108 expressly states also that the copying rights it grants libraries do not override any contractual obligations assumed by the library at the time it obtained a work for its collection. In view of this

provision, librarians must be especially sensitive to the conditions under which they purchase materials. Before executing an agreement which would limit their rights under the copyright law, librarians should seek legal counsel through their administrators.

B. QUESTIONS ABOUT LIBRARY COPYING

1. What rights does the new law grant to libraries regarding reproduction of copyrighted materials?

The new law provides that it is not an infringement for libraries to reproduce no more than one copy of a work or to distribute such copy under specified conditions if (1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage; (2) the collections of the library or archives are (a) open to the public or (b) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and (3) the reproduction or distribution of the work includes a notice of copyright.

2. Does the new law permit libraries to engage in off-the-air copying of broadcast programs?

Yes, in a limited way. The extent to which libraries and educational institutions may copy off the air

under the fair use provision of the law is now being discussed widely. The House Judiciary Committee report (House Report 94-1476) states that the fair use doctrine has limited application to such off-the-air copying, but the amount of copying permissible and the length of the fair use period are still considered items of "unfinished business" by the U.S. Copyright Office.

Certain libraries are specifically authorized by the new law to tape audiovisual news programs. To be eligible for this off-the-air taping, a library must meet the qualifications of Section 108 (a) as set out in the answer to question 1. If it meets these qualifications, the library is free to reproduce on videotape or other medium "local, regional, or network newscasts, interviews concerning current news events, and on-the-spot coverage of news events, and to distribute a limited number of reproductions of such programs on a loan basis" (House Report 94-1733).

3. What news programs fall under the provision for limited reproduction and distribution by qualified libraries and archives?

This provision applies to the daily newscasts of the national networks and local stations which report events of the day, interviews concerning current news events, and on-the-spot coverage of news events. It does not apply (except as allowed by fair use when finally determined) to documentaries (except documentary

programs involving news reporting), magazine format, or other public affairs broadcasts dealing with subjects of general interest to the viewing public.

4. Are there any limitations on the rights of researchers who borrow broadcast news tapes?

Yes. Libraries may lend the tapes only for use in research. A recipient of a copy of a television broadcast may not perform, copy, or sell, whether or not for profit, a copy of the television news broadcast.

5. Can a teacher duplicate, or have duplicated, copyrighted materials and place them on reserve for student use in the library?

Not if there is time to request permission in advance. It is conceivable that a teacher could have such material placed on reserve if the inspiration to use the material comes suddenly, there is no time to request permission, and the material meets the other requirements of brevity and cumulative effect set forth in the guidelines pertaining to books and periodicals (see Chapter II). Otherwise, permission must be sought, unless the materials copied are excerpts only.

6. A student goes to the media center to photograph five pictures from a book on Egypt to include in a report he or she is preparing for class. Is this allowable?

Yes, this would be fair use so long as the number of photographs made is reasonably small in relation to the number of pictures in the book.

7. Students make copies of copyrighted material on coin-operated photocopy machines located in the library. If a student does more copying than is lawful, is the library liable for copyright infringement?

No, not if the machines are unsupervised, provided each machine displays a notice that the making of a copy may be subject to the copyright law. The student making the copies would be liable for copyright infringement, however, if his or her copying exceeded fair use (Sec. 108 [f] [1] and [2]).

8. An academic library has no coin-operated copying machines but instead runs a copy center where students may order copies of materials in the library. Any problems with this system?

There could be. Unlike the situation in question 7 above, the library and/or its employees could be liable for

copyright infringement here unless certain precautions are taken. First, the law requires that the library "display prominently" at the place where orders for copies are received, as well as on the order form, "a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation." Also, the copy made must become the property of the user who requests it, and the library must be unaware that the copy would be used for any purpose other than private study, scholarship, or research. Provided these requirements are met, the library may make for its users copies of articles or excerpts (Section 108 [d] as limited by 108 [g]), or copies of entire works when a work is out of print and an unused copy is not available at a fair price (Section 108 [e]).

9. A college library buys a new art history book containing high-quality color plates of famous works of art. At the request of a teacher, the library/media center makes slides of two or three color plates in the book for use in an art appreciation class. Is this allowable?

Yes, this is authorized by Section 108 (h), but the slides must become the property of the person who requested them, in this case the teacher.

10. A college library has purchased 12,000 art slides from commercial sources and wishes to microfilm them in order to make the collection browsable by students and faculty. The microfiche are placed on the shelf and when a student wishes to browse the works of Picasso, he or she uses the microform and then requests the slide he or she wants from the slide collection. Is this permitted?

No. This is no different from a library's buying one set of an encyclopedia and then photocopying the whole set so as to have "the collection browsable." This is clearly an infringement.

11. In the general conditions applicable to all types of library copying, what is meant by the phrase "the collections of the library are open to the public"? Does this mean that every school library must act as a branch of the public library in order to qualify for any copying privileges?

No. The provision was designed principally to apply to libraries in commercial enterprises. The requirement is that a library's collection be open to the public or available to outside researchers in specialized fields.

V

PENALTIES AND INFRINGEMENTS: BURDEN OF PROOF AND REMEDIES FOR INFRINGEMENT

A. WHAT DOES THE LAW PROVIDE?

For the first time in copyright law and practice, the law includes a provision which shifts the burden of proof from a teacher or librarian who has innocently infringed copyrighted material to the copyright owner. In this respect, furthermore, the court cannot assess damages or other money penalties against the innocently infringing teacher or librarian.

This provision was long sought by the educational community. With the precarious nature of fair use in the 1909 law—and to a lesser degree in the new law—there understandably has been an uneasiness among

teachers and librarians lest they exceed the bounds of fair use unwittingly.

Section 504 (c) (2) of the new law provides:

The court *shall remit* statutory damages in any case where an infringer believed and had reasonable grounds for believing that his/her use of the copyrighted work was fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself which, infringed by reproducing the work in copies or phonorecords; or (ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity . . . infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

Section 504 of the House Report, "Damages and Profits," states the intention of the law in this way:

- In addition to the general "innocent infringer" provision, clause (2) deals with the special situation of teachers, librarians, archivists, and public broadcasters, and the nonprofit institutions of which they are a part. Section 504 (c) (2) provides, that where such a person or institution infringes copyrighted material in the honest belief that what they were doing constituted fair use, the court is precluded

from awarding any statutory damages. It is intended that, in cases involving this provision, the burden of proof with respect to the defendant's good faith should rest on the plaintiff.

B. QUESTIONS ABOUT PENALTIES AND INFRINGEMENTS

1. Is a teacher or librarian who innocently infringes the law subject to the same penalties as those levied against commercial infringers?

No. As noted earlier, the new law shifts the burden of proof from a teacher or librarian who has innocently infringed copyrighted materials to the copyright owner, and the court cannot award statutory damages against the teacher or librarian.

2. Does the same provision apply also to school librarians and other instructional specialists?

Yes. The House debate on the copyright bill confirms that the concept of "teacher" in this provision of the law and in the guidelines on print materials which were negotiated between publishers, authors, and educators is intended by Congress to be defined broadly and to include "instructional specialists working in consultation

with actual instructors." This, of course, would include school librarians.

3. Does the same thing hold true of all librarians?

Yes. Section 504 (c) (2) states that "the court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his/her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library or archives acting within the scope of his or her employment. . . ."

4. In the case of an infringement, who would be sued—the teacher or librarian, the school, the principal, the superintendent, or the school board?

Clearly, the teacher or librarian can be sued, but the school district may also be sued. The person who does the infringing is the *prime* offender.

5. Can one assume that the teacher or librarian is entitled to a first infringement under the presumption of innocence?

No. Frequency of the use is *not* one of the criteria. Rather, it is the knowing. The teacher or librarian would know whether he/she infringed innocently or

knowingly. In the final analysis, however, the publisher has to show it was not an innocent infringement.

6. What are the penalties if the court finds the teacher knowingly infringed the copyright?

Under the new law, and except for the innocent-infringer provision, copyright infringement can result in an injunction against further violations, impoundment of wrongfully duplicated materials, actual damages suffered or "statutory" civil damages of not less than \$250 and no more than \$10,000 per violation, and assessment of attorneys' fees. If the violation is extraordinary, the statutory damages can be increased to \$50,000. For willful violations undertaken for financial gain, criminal penalties also can be levied. First offenders may be imprisoned for up to one year and fined up to \$25,000 in addition to all the civil penalties just enumerated.

Epilogue

Teachers and librarians have worked diligently during the past decade to obtain a copyright law that would ensure access to information without harm to publishers and authors. Congress has now passed a law that seeks to strike such a balance. Educators have the professional responsibility to examine their own teaching-learning practices in light of the new law to make certain these practices conform to the guidelines and the provisions of the new legislation. This will not be an easy task. What we are asking, in one sense, is that many of our most creative, brightest, and most energetic members curtail and cut back on what they have been accustomed to doing over the years. Because they have not been challenged in the courts or even by publishers, these uses of copyrighted materials by teachers and librarians have in many instances become "customary" uses. We urge our members to make every effort to live within the law and to encourage students to do the same, in view of the reasonableness of the guidelines which have been negotiated between the parties concerned.

At the same time, we implore copyright proprietors to exert understanding, tolerance, and goodwill,

combined with a willingness to take one step at a time. It would be extremely unfortunate if publishers were rigid in their interpretation of the law and in their public expressions. This would make even more difficult the enormous task both sides of the controversy will face in "learning to live with the law." As the Register of Copyrights so succinctly phrased it at a recent meeting, "At this point we don't need an atmosphere where everyone tries to sue everyone else!"

In short, what is required on both sides in the public interest is a spirit of reasonableness and fairness to others. To the degree that teachers, librarians, and other instructional specialists can defend their practices as reasonable, to that degree are the courts likely to protect them. Likewise, to the degree that copyright proprietors avoid making unreasonable and inflexible demands upon users, to that degree are teachers and librarians likely to redouble their efforts to live within the letter as well as the spirit of the law. Integrity is asked of the teacher and librarian; trust is asked of the author and publisher.

Appendix A

JOINT STATEMENT OF POLICY

School Rerecording of Public and Instructional Television Programs

With the increased capability for off-air rerecording of educationally useful television programs for replay at times convenient to classroom scheduling, it is important to school systems that public and instructional programs be available for classroom playback, closed-circuit display and other school exhibition modes contemporaneously with local station broadcast. Content copyright and other legal limitations, however, often demand that the use of such program rerecordings be controlled in a manner consistent with original television broadcast authorization.

Accordingly, the below signatory agencies have jointly agreed on the general policy of authorizing supplemental school rerecordings of public and instructional television programs distributed by them for local ETV and other educational broadcast, solely on condition that:

1. School rerecordings may be made only by students, teachers, and faculty or staff members in an accredited non-profit educational institution;

2. School rerecordings will be used solely for classroom, auditorium or laboratory exhibition in the course of classroom instruction or related educational activities;

3. School rerecordings will be used only in the educational institution for which made, and will not be given away, loaned or otherwise made available outside that educational institution;

4. School rerecordings will be used only during the seven-day period of local ETV and other educational broadcast licensed by the distribution agency, and will be erased or destroyed immediately at the end of that seven-day period except to the extent specifically authorized in writing in advance by the distribution agency.

The signatory agencies have agreed that this supplemental school rerecording authorization will be applicable to all public and instructional programs distributed by them, excluding only those prohibited by reason of production or distribution rights restrictions.

PUBLIC BROADCASTING SERVICE

GREAT PLAINS NATIONAL INSTRUCTIONAL
TELEVISION LIBRARY

PUBLIC TELEVISION LIBRARY

AGENCY FOR INSTRUCTIONAL TELEVISION

Appendix B

PHOTOCOPYING—INTERLIBRARY ARRANGEMENTS

(Excerpted from House Report 94-1733)

Introduction

Subsection 108 (g) (2) of the bill deals, among other things, with limits on interlibrary arrangements for photocopying. It prohibits systematic photocopying of copyrighted materials but permits interlibrary arrangements "that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work."

The National Commission on New Technological Uses of Copyrighted Works offered its good offices to

70

the House and Senate subcommittees in bringing the interested parties together to see if agreement could be reached on what a realistic definition would be of "such aggregate quantities." The Commission consulted with the parties and suggested the interpretation which follows, on which there has been substantial agreement by the principal library, publisher, and author organizations. The Commission considers the guidelines which follow to be a workable and fair interpretation of the intent of the proviso portion of subsection 108 (g) (2).

These guidelines are intended to provide guidance in the application of section 108 to the most frequently encountered interlibrary case: a library's obtaining from another library, in lieu of interlibrary loan, copies of articles from relatively recent issues of periodicals—those published within five years prior to the date of the request. The guidelines do not specify what aggregate quantity of copies of an article or articles published in a periodical, the issue date of which is more than five years prior to the date when the request for the copy thereof is made, constitutes a substitute for a subscription to such periodical. The meaning of the proviso to subsection 108 (g) (2) in such case is left to future interpretation.

The point has been made that the present practice in interlibrary loans and use of photocopies in lieu of loans may be supplemented or even largely replaced by a system in which one or more agencies or institutions, public or private, exist for the specific purpose of providing a central source for photocopies. Of course, these guidelines would not apply to such a situation.

Guidelines for the Proviso of Subsection 108 (g) (2)

1. As used in the proviso of subsection 108 (g) (2), the words "... such aggregate quantities as to substitute for a subscription to or purchase of such work" shall mean:

- (a) with respect to any given periodical (as opposed to any given issue of a periodical), filled requests of a library or archives (a "requesting entity") within any calendar year for a total of six or more copies of an article or articles published in such periodical within five years prior to the date of the request. These guidelines specifically shall not apply, directly or indirectly, to any request of a requesting entity for a copy or copies of an article or articles published in any issue of a periodical, the publication date of which is more than five years prior to the date when the request is made. These guidelines do not define the meaning, with respect to such a request, of "... such aggregate quantities as to substitute for a subscription to [such periodicals]."
- (b) with respect to any other material described in subsection 108 (d) (including fiction and poetry), filled requests of a requesting entity within any calendar

year for a total of six or more copies or phonorecords of or from any given work (including a collective work) during the entire period when such material shall be protected by copyright.

2. In the event that a requesting entity—

(a) shall have in force or shall have entered an order for a subscription to a periodical, or

(b) has within its collection, or shall have entered an order for, a copy or phonorecord of any other copyrighted work,

material from either category of which it desires to obtain by copy from another library or archives (the "supplying entity"), because the material to be copied is not reasonably available for use by the requesting entity itself, then the fulfillment of such request shall be treated as though the requesting entity made such copy from its own collection. A library or archives may request a copy or phonorecord from a supplying entity only under those circumstances where the requesting entity would have been able, under the other provisions of section 108, to supply such copy from materials in its own collection.

3. No request for a copy or phonorecord of any material to which these guidelines apply may be fulfilled by the supplying entity unless such request is accompanied by a representation by the requesting entity that the request was made in conformity with these guidelines.

4. The requesting entity shall maintain records of all requests made by it for copies or phonorecords of

any materials to which these guidelines apply and shall maintain records of the fulfillment of such requests, which records shall be retained until the end of the third complete calendar year after the end of the calendar year in which the respective request shall have been made.

5. As part of the review provided for in subsection 108 (i), these guidelines shall be reviewed not later than five years from the effective date of this bill.